

Report Relating to Paragraph 1(f) of the Order In Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell

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Executive Summary

The first part of the report examines the significance of an order for a new trial by the Minister of Justice under section 696.3(3)(a)(i) of the Criminal Code in light of the Canadian experience with such extraordinary relief and with wrongful convictions. An order for a new trial under section 696.3(3)(a)(i) requires the Minister of Justice to conclude that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. At the same time, the order for a new trial, leaves the issue of the applicant's guilt or innocence to the new trial. The author examines the rarity of Ministerial orders for a new trial and the reasonable expectation that they create that the successful applicant will receive another day in court. Three of the four orders for a new trial under the new s.696 system- the cases of Steven Kaminski, Darcy Bjorge and James Driskell- have resulted not in a new trial but in the entry of a prosecutorial stay under s.579 of the Criminal Code.

The second part of this report examines the significance of a prosecutorial stay under section 579 of the Criminal Code, as well as the related common law device of a nolle prosequi. The author concludes that the prosecutorial stay, like the nolle prosequi, does not result in an adjudication of guilt and it leaves the accused vulnerable to subsequent proceedings. In his recent Newfoundland report, Chief Justice Lamer commented that "a stay of proceedings may leave an impression with the public that the charge is being 'postponed' or 'the authorities', in the broad sense, still believe in the validity of the charged." Proceedings can be recommenced on the same indictment within a year of the entry of the prosecutorial stay, but thereafter the proceedings are deemed under s.579(2) never to have taken place.

Jurisprudence relating to prosecutorial stays is examined including the Supreme Court's reference to a prosecutorial stay in the David Milgaard reference and its more recent recognition in the Rejean Hinse case that a judicial stay did not provide the accused with a ruling on his innocence or culpability and that an acquittal was a more appropriate disposition in the circumstances of that case. Although prosecutorial stays have traditionally been immune from judicial review, the current position is that they can be challenged as an abuse of process, but that the courts will generally defer to their use as a legitimate form of prosecutorial discretion. Provincial policies relating to the use of prosecutorial stays are also examined and the conclusion reached that none of the provincial policies examined, including Manitoba's, specifically address the use of prosecutorial stays in cases where the Minister of Justice has concluded that a miscarriage of justice likely occurred and that many existing provincial policies do not examine the prosecutorial stay in light of possible alternatives open to Crown counsel .

The third part of the report examines alternative dispositions open to Crown counsel in cases where a new trial has been ordered under section 696.3(3)(a)(i). One alternative is the conduct of a new trial in which the prosecutor will have to prove the convicted person's guilt beyond a reasonable doubt. If there is no reasonable prospect

of conviction, however, the option of a new trial will not be appropriate. In such cases, the prosecutor can withdraw charges, but this will not generally produce a verdict of acquittal or allow the accused to plea *autrefois acquit*. Another alternative is for Crown counsel to call no evidence and for the accused to obtain a not guilty verdict that will protect him or her from subsequent prosecutions about the same matter.

The fourth part of the report, drawing heavily on Chief Justice Lamer's recent Newfoundland report, proposes a number of principles that should govern Crown counsel's choice of alternative responses to an order for a new trial under s.696.3 of the Criminal Code. Chief Justice Lamer noted that practices on the use of prosecutorial stays varied throughout Canada, but concluded that prosecutorial stays should only be used when there is "where there is a reasonable likelihood of recommencement of proceedings but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen." This standard recognizes that the prosecutorial stay leaves a person open to further proceedings and should only be used with there is a reasonable expectation that the prosecution will indeed be recommenced.

The author notes that Chief Justice Lamer's guidelines are proposed for prosecutorial stays in general. In the extraordinary context of an order of a new trial by the Minister of Justice under section 696.3 and where the case will already have been subject to reinvestigation, the author suggests three additions to the Lamer guidelines. They are 1) that a prosecutorial stay should only be entered by the Attorney General or the Director of Public Prosecution, 2) after hearing submissions from the successful applicant and that 3) that any decision to enter a prosecutorial stay should be revisited as soon as possible and in any event within a year of the entry of the stay and before the proceedings are deemed under s.579(2) never to have been commenced. At that time, prosecutors should either proceed with the new trial that has been ordered by the Minister of Justice or call no evidence so that the accused receives a not guilty verdict. A prosecutorial stay should not be the final disposition for a successful s.696.1 applicant.

The final part of the report outlines a variety of methods by which a determination or declaration of a wrongful conviction can be made in a case where the Minister of Justice has ordered a new trial, but a prosecutorial stay has been entered. As preliminary matters, however, the author examines the distinction between a prosecutorial stay which produces no verdict and a determination of a wrongful conviction, as well as the distinction between a not guilty verdict that legally represents a failure by the state to prove guilt beyond a reasonable doubt and a determination of a wrongful conviction based on innocence. Possible standards for making a determination or declaration of innocence or a wrongful conviction are examined based in part on the standards outlined by the Supreme Court of Canada in the 1992 David Milgaard reference. The author argues that the highest standard of proof of innocence beyond a reasonable doubt places an unrealistic burden on the applicant, except in cases of DNA exonerations and he argues that declarations of wrongful convictions should not be restricted to such cases. The author suggests that the most likely standard that would be used to declare the existence of a wrongful conviction would require the convicted person to establish innocence on a balance of probabilities and that this would create a meaningful distinction in law between a not

guilty verdict that would occur when the state failed to prove guilt beyond a reasonable doubt and a declaration of a wrongful conviction or innocence.

The author examines a variety of informal means of obtaining a determination and a declaration of a wrongful conviction including apologies and recognition of innocence by police and prosecutors and civil society reviews and exonerations. He also examines administrative processes including the s.696.1 process, the issue of free pardons, public inquiries, and the compensation process. Finally, he examines possible judicial processes including those relating to interim release pending the s.696.1 process, determinations by Courts of Appeals under s.696.3(2), judicial apologies and civil actions. He argues that the judiciary should be responsible for determination and declarations of wrongful convictions because the executive may be reluctant to acknowledge guilty and because wrongful convictions are matters within the inherent domain and responsibility of the judiciary as opposed to the executive.

The author reviews two Court of Appeal cases that suggest that courts may have no jurisdiction to consider a case after the entry of a prosecutorial stay under section 579. In such cases, the convicted person may be forced to seek exoneration through other less satisfactory informal or administrative means or through expensive civil lawsuits or even requests that the Attorney General re-commence proceedings with a new charge. The author argues that this state of affairs underlines the need for prosecutorial stays only to be used as provisional measures after a new trial has been ordered by the Minister of Justice on the basis of reasonable grounds to believe that a miscarriage of justice has likely occurred. Successful s.696.1 applicants should not be left in the legal limbo of the prosecutorial stay. They deserve their day in court, the finality of a verdict and an opportunity to seek a judicial determination and declaration of whether they are an innocent victim of a wrongful conviction.